Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JENNIFER LEE HIATT,
Petitioner

V.

INDIANA STATE STUDENT ASSISTANCE COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

Whether 11 U.S.C. § 523(a)(8)(A) which delays educational loan dischargeability for five (5) years from when such loan first became due, requires computation of such period from the date the original loans "first became due", regardless of any subsequent loan consolidation. (emphasis added)

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JENNIFER LEE HIATT,
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v.

INDIANA STATE STUDENT ASSISTANCE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jennifer Lee Hiatt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) in this case under No. 93-4050.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, A1-A7) is reported at 36 F.3d 21. The opinions of the district court (App., infra, B1 - B19) and bankruptcy court (App., infra, C1 - C9) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 15, 1994. The jurisdiction of this Court is invoked under 29 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

11 U.S.C. § 523 controls and determines educational loan dischargeability in this appeal and sets forth as follows:

> (a) A discharge under Section 727, 1141, or 1328 (b) of this title [11 U.S.C. § 727, 1141, or 1328 (b)] does not discharge an individual debtor from any debt...

(8) For an educational loan made, insured,or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution of higher education unless;

> (A) Such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of filing of the petition (emphasis added); or...

STATEMENT

The Petitioner, Jennifer Hiatt, ("Hiatt"), appellant below, filed her bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, Northern District of Indiana, Hammond Division at Lafayette, on May 24, 1991, under Cause Number 91-40365. The case proceeded to include an adversary complaint to determine educational loan dischargeability filed on June 19, 1991, under Adversary No. 91-4027. Hiatt filed her Summary Judgment against the Respondent, Indiana State Student Assistance Commission ("Commission") in its capacity as an education loan guarantor and creditor pursuant to 11 U.S.C. §523(a)(8)(A).

A. 11 U.S.C. §523(a)(8)(A) and Its Limited Exception to Educational Loan Discharge.

This case involves the proper interpretation and application of a limited and delayed exception to a debtor's normal right to a "fresh start" through a "discharge" or cancellation of debt under the federal bankruptcy code. This review of the discharge exception is aided by an understanding of the background of 11 U.S.C. §523.

Under 11 U.S.C. §523, several types of debts are excluded from discharge and continue to be binding obligations of the debtor notwithstanding the bankruptcy filing and subsequent discharge of other debts. This provision carries over from the Bankruptcy Act of 1898, as amended, the policy that certain debts should not be discharged. For instance, several forms of taxes are excluded or delayed

from discharge, as are alimony, maintenance and support obligations, along with false pretenses, fiduciary misconduct, malicious injury, among others. Unlike the 1898 Bankruptcy Act the current 1978 Code contains a delay in discharging educational loans unless "(s)uch loan first became due before five years... before the date of filing of the petition ..." 11 U.S.C. §523(a)(8)(A). The "first became due" as applied to computation of the five year period is core to the proper interpretation and application of this bankruptcy provision.

11 U.S.C. §523 as codified in the 1978 Bankruptcy Code is actually a re-codification of prior amendments made in 1976 to the Higher Education Act of 1965, §439(A) (20 U.S.C. §1087-3). This amendment made educational loans authorized by the statute non-

dischargeable in bankruptcy for five (5) years from "the date of commencement of the repayment period". 20 U.S.C. §1087-3(A) (1976) (Repealed 1978).

This was the law until the Bankruptcy Reform Act of 1978 became effective, as congress transferred most educational loan discharge matters to the bankruptcy code. Title 11 of the bankruptcy code repealed §1087-3 and put in its place 11 U.S.C. §523(a)(8)(A) which "follows generally current law and excepts from discharge student loans until such loans have been due and owing for five years". S.Rep. No. 95-989 95th Com., 2nd Sess. 79 (1978), reprinted U.S. Code Cong. Admin. News 1978, pg 5787, 5865. (Undue hardship is not claimed).

Other than minor "housekeeping" changes, e.g., clarify, add covered loans, and extend non-dischargeability to seven

years) the thrust and intent of 11 U.S.C. §523(a)(8)(A) has never been altered or revisited by Congress. It is clear that when it passed §523(a)(8)(A), Congress only contemplated the original student loans when it used the phrase "such loan first became due" because loan consolidations were not statutorily authorized. However, in 1986 Congress enacted amendments to the Higher Education Act to expressly permit loan consolidations for the first time. 20 U.S.C. §1078-3. The legislative history of the loan consolidation amendments to Title 20 are devoid of any reference to bankruptcy or dischargeability. Thus, Congress failed to expressly modify or change the starting point by which educational loans were discharged - that is, when the original student loans first entered the re-payment cycle.

Other prior congressional enactments shed light as to the intent and purpose of 11 U.S.C. §523. For instance, Health Educational Assistance Loans (HEAL Loans) for a short time were controlled by 11 U.S.C. §523. Prior to the 1978 bankruptcy code, HEAL Loans were controlled in 42 U.S.C. §294f(g) (1976). This code section was repealed by the 1978 Bankruptcy Reform Act. However, Congress in 1981 reenacted this section in order to make discharge more difficult for HEAL Loans, and did not place this language in Title 11, but rather than under Title 42 (42 U.S.C. §294f(g), P.L. 97-35, 95 Stat. 357). Even then, Congress permitted discharge on certain conditions "after the expiration of the five year period beginning on the first date... when repayment of such loan is required." 42 U.S.C. §294(g). The significant statutory harmony and

historical interplay is that both of these earlier statutes (educational loan discharge delay, 20 U.S.C. §1087 - 3(a) and HEAL loan discharge delay, 42 U.S.C. §294f(g)) were enacted in 1976, repealed in 1978 by the new bankruptcy code, and both essentially prohibited discharge until after five years from the date repayment first began.

The question presented here is whether the most fundamental tenet of the bankruptcy code, the "fresh start" to debtors, can be delayed for any period beyond what Congress explicitly stated, without some indicia, express or implied, of congressional intent to do so.

B. Proceedings Below

Between 1983 and 1985, Hiatt (Debtor) obtained guaranteed student loans that qualify as educational loans under 11 U.S.C. §523(a)(8)(A) which were made,

insured, or guaranteed by a governmental entity. Hiatt's loans total $12,101.48, principal as of March 17, 1992. All of Hiatt's original student loans entered the repayment cycle and otherwise became due and owing on or about January 5, 1986. On July 23, 1987, Hiatt entered into a loan consolidation under a program authorized by the United States Department of Education. On May 24, 1991, Hiatt filed a bankruptcy petition pursuant to Chapter 7, and subsequently Hiatt initiated an adversary complaint against the Commission for determination of the dischargeability of her educational loan debts. Hiatt's legal position was that her educational loan debt was dischargeable because her petition in bankruptcy was more than five (5) years after her original student loans had "first become due". The bankruptcy court ruled on Hiatt's motion for summary

judgment that the debt was not dischargeable because the obligation before the court was the consolidated loan, not the original loan and held that the five (5) year period began all over again on the date the consolidated loan ("such loan") first became due. The bankruptcy court's jurisdiction was premised on core proceedings pursuant to 28 U.S.C. 157(b)(2)(E). The district court affirmed the bankruptcy court on November 24, 1995. The district court's jurisdiction was pursuant to 28 U.S.C. §158(a). The United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed even though it acknowledged that "the district court's interpretation might, as argued by Hiatt, serve to extend the total non-dischargeability period significantly in some case by effectively restarting it at

the time the subsequent consolidation loan first becomes due...". The Court of Appeals exercised appellate jurisdiction pursuant to 28 U.S.C. §158(d) and 28 U.S.C. §1294(a).

The district court and court of appeals discounted the legislative history of 11 U.S.C. §523 on the rationale that the statute is plain on its face in that "such loan" refers to the consolidation loan currently before it, irrespective that the statutory language relied upon was written before loan consolidations were authorized. The Seventh Circuit refused to give proper deference to prior case law and legislative history, or acknowledge that any reading of an exception or delay to the main statutory purpose ("discharge" and "fresh start") should be construed narrowly.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision in this case is the first time a circuit court of appeals has grappled with the discharge of education loans under 11 U.S.C. §523(a)(8)(A). This issue has created a developing conflict between an established line of bankruptcy (trial) court decisions and the recent trend of district courts reversing same, and continues to undermine and frustrate the economic climate for educational loan debtors and their lenders. This case is a critical opportunity for this Court to provide timely guidance, since systemically few of the bankruptcy court or district court decisions will ever receive appellate review due to the chilling effect of the Seventh Circuit's precedent, and the economic reality that most debtors desiring an appeal simply

cannot afford access to our legal system's appellate review. Moreover, the decision below is erroneous and the federal issue addressed is critically important to debtors, their lenders, and the overall statutory purpose.

I. The Court of Appeals Interpretation of 11 U.S.C. §523 Further Aggravates the Growing Split of Authority Between Bankruptcy Courts and District Courts, Thus Creating a Chilling Effect Discouraging Economically Disadvantaged Debtors from Seeking Appellate Review.

The Seventh Circuit, by affirming the district court, has advanced a decisional interpretation of the bankruptcy code at odds with the majority of bankruptcy (trial) courts in this country which have addressed the issue as to when the five-year period commences - original loan repayment versus subsequent loan consolidation. In fact, the Seventh Circuit's decision is now the leading

decision in the country at the circuit level supporting a change in the statute's historical application without any express or implied direction from Congress. The past uniformity of bankruptcy courts is compelling. For instance, since 1980 the vast majority of bankruptcy courts addressing this issue (effect of loan consolidation) have held that Congress intended the original notes to start the five year period, not any subsequent loan consolidation. In Re: Brown, 4 B.R. 745 (Bankr. E.D. Va 1980); Accord, In Re: Ziglar, 19 B.R. 298 (Bankr. E.D. Va 1982); In Re: Washington, 41 B.R. 211 (Bankr. E.D. Va. 1984); In Re: Hogan, 43 B.R. 117 (Bankr. D. Az. 1984). As is fairly apparent from the foregoing case law, student loans were being consolidated prior to the 1986 statutory amendment expressly authorizing same. This

uniformity continued even after the loan consolidation amendment, with the bankruptcy courts continuing to hold that the date the original notes entered the repayment cycle commenced the computation of the five year period. See, In Re: Barciz, 123 B.R. 771 (Bankr. N.D. Ohio 1990); In Re: McKinney, 120 B.R. 416 (Bankr. N.D. Ohio 1990), rev'd, No. 1:90CV1946, 1992 U.S. WL 265992, 1992 W.L. 265992,

Curiously, 1992 began the contrary trend in judicial decisions construing §523 in the context of loan consolidations. In Re: Saburah, 136 B.R. 246 (Bankr. C.D. Cal. 1992), was one of the first of the recent decisions to conclude that the date of the loan consolidation began the computation period, not the repayment date of the original loan. The Commission below

argued and fully adopted the reasoning of McKinney II, district court reversal, holding that 20 U.S.C. §1078 - 3, which created loan consolidations, refer to them as "new" loans and that Title 11 §523 referred to "such loan" and reasoned that the only loan before the court was the loan consolidation. McKinney, 120 B.R. 416 (Bankr. N.D. Ohio 1990) rev's, No. 1:90CV1946, 1992 W. L. 265992 (D. N.D. Ohio, May 12, 1992).

Other courts are following the McKinney or Suburah rationale, Martin v. Great Lakes Higher Education Corp., 137 B.R. 770 (Bankr. W.D. Mo. 1992), and now so has the Seventh Circuit. This is creating a rift in the equal treatment of debtors who can least afford to defend themselves. In fact, most debtors can barely afford the cost of their bankruptcy petition, and the Seventh Circuit's

precedent along with the costs of appeal will dissuade most debtors from even remotely considering appeal to an adverse loan dischargeability decision. Unlike Hiatt, most debtors will not be fortunate enough to find legal counsel willing to represent them pro-bono.

For all of the foregoing reasons, the Seventh Circuit's precedent will only rarely be challenged in any of the other bankruptcy courts, districts courts, or ultimately in the circuit courts of appeal throughout the country. Trial courts will be left with only one erroneous circuit precedent to guide them. Thus, the ability of this Court to exercise appellate review in the future will be negligible. This case presents a timely opportunity to establish proper guidance to the lower courts, and the Court should grant the Petition.

II. The Seventh Circuit's Decision is Erroneous and Stands the Process of Statutory Interpretation on its Head.

This Court's decisions teach how the lower courts should apply the cannons of statutory construction. The Seventh Circuit has embraced an interpretation and "literal application of a statute (that) will produce a result demonstrably at odds with the intentions of its drafters". Griffin v. Ocean Contractors, Inc., 458 U.S. 564, 571 (1982); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). This Court cannot permit such an egregious breach of statutory interpretation. Congress statutorily expressed only one (1) period of educational loan non-dischargeability - five (5) years from when "(s)uch loan first became due". The major flaw of the Seventh Circuit's literal or plain meaning rationale is that this new literal

application would permit an almost ten (10) years of loan non-dischargeability clearly at odds with the express five (5) years in the statute. Today, this would equate to almost fourteen (14) years, when through the statute only mentions seven (7).

The weakness of the Seventh Circuit's decision is best evidenced by the following example:

> Debtor A's original student loans entered the repayment cycle and first became due on January 1, 1990. On December 31, 1994, Debtor A enters into a loan consolidation agreement.
>
> Debtor B's original student loans enter the repayment cycle and first became due on January 1, 1990. On January 2, 1995, Debtor B files a Chapter 7 Bankruptcy Petition.

Under the Seventh Circuit's decision, Debtor A's debts are now non-dischargeable

for almost 10 years - in contra distinction to the clear and plain statutory language congress used (five years). Debtor B, on the other hand, may now discharge and obtain a fresh start. Consequently, not only has the Seventh Circuit extended the non-discharge period significantly beyond what congress expressed, it has created two classes of student loan debtors - those that haven't consolidated and can discharge, and those who have and cannot. Such a disparate classification is wholly without any congressional intent whatsoever.

In fact, the Seventh Circuit admits that:

> ...the district court's interpretation might, as argued by Hiatt, serve to extend the total non-dischargeability period significantly in some cases by effectively restarting it at the time the subsequent consolidation loan first becomes due, such extension of the non-

> dischargeability period does not render that interpretation "demonstrably at odds"...

App., pg. 6. It is extremely curious how the Seventh Circuit on one hand agreed that the non-dischargeability period would substantially increase beyond the five years congress expressed, and still hold such a result as not "demonstrably at odds" based on explicit statutory language. The congressional policy was to delay dischargeability for only five years, no longer, and the Seventh Circuit's plain meaning rational fails when squared against express statutory language. The longer the period between graduation and the bankruptcy petition, the weaker the congressional policy becomes in denying discharge. Elmira College v. Savercoo, 51 B.R. 180, 182 (W.D.N.Y. 1985). This is the rare case where implementation of the plain or

ordinary language, without guidance from the author's intentions, creates an absurd result. INS. v. Cardozo - Fonseca 480 U.S. 421, 452 (Scalia, J., concurring in result) (1987).

The Seventh Circuit's rational was based on the Commission's argument that congress wanted to "curtail abuse and to promote viability" of the educational loan program. App., pg. 5. Actually, congressional intent was to simply delay students from discharging their educational loans for five years after leaving school, and five years was deemed an adequate period of time. 125 Cong. Rec. 9168 (daily ed. July 11, 1979) (remarks of Sen. Deconcine). The legislative history unequivocally supports Hiatt's position that congress' intent was to permit debtors to discharge their loan except during the initial five years after

such loan entered into the re-payment cycle. The 1976 amendments to the Higher Education Act made loans non-dischargeable for five years from "the date of commencement of the re-payment period". 20 U.S.C. §1087 - 3(a) (1976) (Repealed 1978). Moreover, 11 U.S.C. §523 as the successor to the 1976 prohibition in Title 20, was intended to promote uniform and equal treatment of student loans in bankruptcy in the context of non-dischargeability. S. Rep. No. 230, 96th Cong., 2d Sess., 1-3, reprinted in 1979 U.S. Code Cong. & Adm. News 936. The Seventh Circuit's reading of 11 U.S.C. §523 creates disparity not uniformity, and is at best an attempt to set bankruptcy code "policy" something the code has not delegated to the courts, or at worst, is a camouflaged attempt at judicial legislation under the guise of statutory

interpretation. Regardless of whether the concept of discharge of student loans is politically, or socially repugnant or what the courts think an enlightened congress should have done, the courts must refrain from re-writing statutes based on a preconceived idea of the preferred congressional action or outcome.

III. The Question Presented Is Important and the Economic Harm to Debtors Is Substantial and Imminent.

The Seventh Circuit's misguided reading of 11 U.S.C. §523(a)(8)(A) will create substantial economic havoc and uncertainly for the foreseeable future. A whole generation of innocent and well-deserving student loan debtors will be denied discharge and a fresh start due to the precedent of the Seventh Circuit which many courts throughout the country can be expected to follow. Given the fact that

further reviewable circuit decisions will be remote and problematic, this Court should give timely guidance and resolution to the financial plight of student loan debtors.

The primary logic of the Seventh Circuit's holding also fails scrutiny. The congressional intent espoused by the Commission and adopted by the Seventh Circuit (viability of the educational loan system) will now be threatened. Now, whenever a student debtor in the future seeks the advise of legal counsel concerning his or her financial options and whether to file bankruptcy, they will be informed that if he or she pursues a loan consolidation, they will be ineligible for Chapter 7 relief for an additional 5 (now 7) years. Given that the financial situation of most debtors is precarious at best, then that debtor will

likely choose to file bankruptcy immediately after the 5 years period runs, rather than attempt loan consolidation and forfeit future relief in the bankruptcy courts. This result is at odds with the purpose for loan consolidations under Title 20. The Seventh Circuit has itself tipped the scales in favor of bankruptcy rather than loan consolidation without ever considering the effects its own precedent would have. Thus, the Seventh Circuit has harmed the purpose and intent of two important statutes, (11 U.S.C. §523 and 20 U.S.C. §1078 - 3) and altered their application.

Resolution of when education loans may be discharged - and a decision upholding original congressional intent - is necessary in order to promote uniformity between debtors and for stability of the federal loan

consolidation program. Unless this Court acts, bankruptcy (trial) courts will be faced with the daunting task of attempting to divine an important federal law, with differing results depending upon the district or circuit. Bankruptcy debtors deserve a uniform system that permits a "fresh start" without regard to the jurisdiction in which they file their petitions under the national bankruptcy code. This petition presents a rare opportunity to bring much needed guidance, uniformity and fundamental fairness to a statute of tremendous economic importance to the citizens and lenders in this country. For this reason, the Court should grant the petition.

CONCLUSION

This entire case can be best summarized by positing the following query: what did the Congress intend, and when did it intend it. Unless this Court grants the petition, the lower courts will be without guidance as to the proper interpretation of an important federal statute and the Seventh Circuit's egregious application of the cannons of statutory construction will stand for all to embrace. Without this Court's intervention, statutory construction will be whatever the lower courts say it is.

This case and the question presented is unique in that future opportunities for review will be almost negligible due to the chilling effect of the Seventh Circuit's precedent and the economic realities of most bankruptcy debtors.

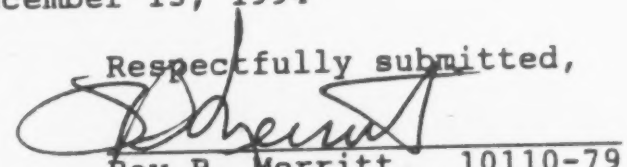
In fact, the viability and stability of

the student loan program will be at risk, as informed student debtors will now opt to file bankruptcy early, after five (now 7) years, rather than close the door on bankruptcy for at least another five (now seven) years by entering into a loan consolidation.

The Seventh Circuit's decision is flawed and misguided, its effect will be widespread, and the course of two federal statutes (Title 11 & 20) will fail congressional purpose unless this Court grants this petition.

Dated: December 13, 1994

Respectfully submitted,



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APPENDIX

A. Decision and Judgment of the United States Court of Appeals for the Seventh Circuit, entered September 15, 1994.

B. Decision and Judgment of the United States District Court for the Northern District of Indiana, entered November 24, 1993.

C. Decision, Order and Judgment on Motion for Summary Judgment entered by the United States Bankruptcy Court, Northern District of Indiana on December 3, 1992, and August 10, 1993, respectively.

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-4050

JENNIFER LEE HIATT,

Plaintiff-Appellant,

v.

INDIANA STATE STUDENT ASSISTANCE COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 93 C 72—**Allen Sharp**, *Chief Judge.*

ARGUED MAY 9, 1994—DECIDED SEPTEMBER 15, 1994

Before MESKILL,* FLAUM, and MANION, *Circuit Judges.*

MESKILL, *Circuit Judge.* This appeal requires the Court to determine the commencement date of the period of non-dischargeability imposed by 11 U.S.C. § 523(a)(8)(A), for student loans, where the original loans have been superseded by a consolidation loan obtained pursuant to 20 U.S.C. § 1078-3. Section 523(a)(8)(A) provides that an individual debtor shall not be discharged from any debt "for an educational loan made, insured, or guaranteed by a govern-

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* Honorable Thomas J. Meskill, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

mental unit . . . unless . . . such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the [bankruptcy] petition."[1] The appellant, Jennifer Lee Hiatt, challenges the determination by the United States District Court for the Northern District of Indiana, Sharp, *C.J.*, that Hiatt's educational debt is nondischargeable because the nondischargeability period begins on the date on which the consolidation loan first became due. We affirm the judgment of the district court.

BACKGROUND

Between 1983 and 1985, Hiatt obtained several educational loans from the appellee, Indiana State Student Assistance Commission (Commission), which has been designated by the United States Department of Education (Department of Education) to guarantee educational loans. Hiatt's educational loans first became due on January 5, 1986. On July 23, 1987, Hiatt voluntarily consolidated the loans pursuant to a Department of Education loan consolidation program. *See* 20 U.S.C. § 1078-3 (describing loan consolidation program). The consolidation entailed taking a new "consolidation loan" from the Commission, the proceeds of which were used to repay in full Hiatt's original educational loans. *See id.* § 1078-3(b)(1)(D). Payments on Hiatt's consolidation loan first became due on or about September 20, 1987. Less than four years later, on May 24, 1991, Hiatt filed a bankruptcy petition pursuant to Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 701 *et seq.*

In conjunction with her petition, Hiatt filed an adversary complaint against the Commission, seeking a determination that her educational debt was dischargeable under

[1] After the appellant had filed her Chapter 7 bankruptcy petition, an amendment to section 523(a)(8)(A), increasing the nondischargeability period to seven years, became effective. The parties agree that this amendment does not apply in this case.

section 523(a)(8)(A). Hiatt contended that her debt was dischargeable because she had filed her bankruptcy petition after the nondischargeability period for the original loans had expired, even though she had consolidated her loans within the nondischargeability period.

On Hiatt's motion for summary judgment, the bankruptcy court held that the debt was not dischargeable, and determined that Hiatt owed the Commission $12,051.55. Hiatt appealed the bankruptcy court's decision to the district court, *see* 28 U.S.C. § 158(a), which affirmed. Hiatt now appeals the district court's judgment pursuant to 28 U.S.C. §§ 158(d) and 1294(a).

DISCUSSION

In urging reversal of the district court, Hiatt contends that the court erred in holding that her educational debt is not dischargeable under section 523(a)(8)(A). Hiatt relies primarily on the legislative history of section 523(a)(8)(A) and on a series of decisions that she contends supports her claim that the date on which the nondischargeability period commences is the date on which the educational loan originally became due, regardless of the date on which a subsequent consolidation loan first became due. The Commission contends, on the other hand, that the plain language of section 523(a)(8)(A) supports the district court's decision and argues that, if we were to adopt the debtor's argument, Congress' goal of providing a stable and viable student loan program would be frustrated. We review *de novo* the district court's interpretation of section 523(a)(8)(A). *See Woodbridge Place Apartments v. Washington Square Capital*, 965 F.2d 1429, 1435 (7th Cir. 1992).

To determine the date on which the nondischargeability period begins to run pursuant to section 523(a)(8)(A), we look first to the language of that provision. *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990). In interpreting this provision of the Bankruptcy Code, however, "we must not be guided by a single sentence or member of a sentence, but look to

the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). The plain language of the statute will not control, therefore, if it yields " 'a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 523(a)(8)(A) provides that the debt relating to a government guaranteed educational loan is not dischargeable until five years after "*such loan* first became due." (emphasis added). The term "such loan" refers in this case to the consolidation loan, which Hiatt concedes is an educational loan within the meaning of section 523(a)(8)(A). Indeed, when Hiatt "consolidated" her educational debt in 1987, she undertook a new loan from the Commission, the proceeds of which were used to repay in full her original educational loans. *See* 20 U.S.C. § 1078-3(b)(1)(D). The notes on her original loans were cancelled and the debt discharged. The only outstanding debt that Hiatt currently owes to the Commission, therefore, is the new, distinct debt incurred when she took the consolidation loan.[2] Be-

[2] The commission additionally argues that 20 U.S.C. § 1078-3(d) requires that we treat the consolidation loan as a new loan for purposes of measuring the nondischargeability period. Section 1078-3(d) provides that "[l]oans made under this section which are insured by the Secretary shall be considered to be new loans made to students for the purpose of section 1074(a) of this title [which limits total principal amount of new loans to students covered by federal loan insurance]." We need not address this argument because we conclude that, by virtue of its statutorily prescribed operation, *see, e.g.*, 20 U.S.C. § 1078-3(b)(1)(D), the consolidation loan is a new loan creating new debt. *Compare In re McKinney*, 1992 U.S. Dist. LEXIS 14796, at *7 (N.D. Ohio 1992) (*McKinney II*) (relying on section 1078-3(d) to conclude that consolidation loan is a "new loan" and that nondischargeability period begins to run on day consolidation loan first became due), *rev'g In re McKinney*, 120 B.R. 416 (Bankr. N.D. Ohio 1990) (*McKinney I*), *with In re Saburah*, 136 B.R. 246, 251 (Bankr. C.D. Cal. 1992) (holding that nondischargeability period begins to run on day consolidation loan first becomes due, but declining to rely on section 1078-3(d)).

cause that loan "first became due" less than five years before Hiatt filed her bankruptcy petition, section 523(a)(8)(A) provides that the debt is nondischargeable. *See also, e.g., McKinney II*, 1992 U.S. Dist. LEXIS 14796, at *6-*7; *In re Martin*, 137 B.R. 770, 772 (Bankr. W.D. Mo. 1992); *In re Saburah*, 136 B.R. at 252.

Hiatt challenges such an interpretation of the plain language of section 523(a)(8)(A) by arguing that it conflicts with the congressional intent underlying that provision. Although the Bankruptcy Code generally seeks to provide a Chapter 7 debtor with a "fresh start" by discharging the debtor's debts, *see Levinson v. United States*, 969 F.2d 260, 263 (7th Cir.), *cert. denied*, 113 S.Ct. 505 (1992), Congress has designated some debts as nondischargeable in bankruptcy. *See, e.g.*, 11 U.S.C. § 523(a)(5) (alimony and child support payments); *id.* § 523(a)(6) (liability incurred as a result of the debtor's willful and malicious conduct). Congress created these exceptions to the general rule of dischargeability on the ground that "the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

Congress included government guaranteed educational loans in the group of presumptively nondischargeable debts because it believed that many student borrowers were abusing the "fresh start" policy by filing for bankruptcy and obtaining discharge of educational debt soon after graduation, before making any significant attempts at repayment. *See In re Nunn*, 788 F.2d 617, 619 (9th Cir. 1986); *see also 3 Collier on Bankruptcy* § 523.18, at 523-148 & n.2 (15th ed. 1985) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1979)). Congress permitted the discharge of educational debt, however, if the bankruptcy petition was filed at least five years after the loans first became due. *See also* 11 U.S.C. § 523(a)(8)(B) (creating undue hardship exception to nondischargeability provision). The enactment of the five year nondischargeability period thus reflected the congressional purpose of shielding the government guaranteed educational loan program from opportunities for abuse.

Although the district court's interpretation might, as argued by Hiatt, serve to extend the total nondischargeability period significantly in some cases by effectively restarting it at the time the subsequent consolidation loan first becomes due, such extension of the nondischargeability period does not render that interpretation "demonstrably at odds with" Congress' intent to curtail abuse and to promote the viability of the federal student loan program. *See Ron Pair Enters.*, 489 U.S. at 242. Rather, the district court's interpretation furthers the congressional policy by ensuring that a consolidation loan, which is in fact a second government guaranteed student loan debt, is collectible for at least five years before it is dischargeable.

Finally, the cases cited by Hiatt do not persuade us that the district court's interpretation of the plain meaning of section 523(a)(8)(A) is improper. Many of those cases did not address the specific issue before us here and, therefore, are not useful. *See, e.g., Nunn*, 788 F.2d at 619 (court considered whether the "first became due" language in section 523(a)(8)(A) referred to the date on which the educational loan first entered the repayment stage or the date of the debtor's last actual installment payment); *In re Ziglar*, 19 B.R. 298, 300 (Bankr. E.D. Va. 1982) (dispositive issue is whether a particular loan is an "educational loan" within the meaning of section 523(a)(8)(A)); *In re Brown*, 4 B.R. 745, 746 (Bankr. E.D. Va. 1980) (court determined that five year nondischargeability period begins to run on the date on which a student borrower's original notes first came due, not the date of default on a subsequent installment note, at which point the entire balance came due). Moreover, several cases cited by Hiatt discuss whether an alteration of the terms of an educational loan constituted a "suspension of the repayment period" within the meaning of section 523(a)(8)(A). *See, e.g., In re Gremler*, 127 B.R. 202, 204 (Bankr. E.D. Wis. 1991); *In re Barciz*, 123 B.R. 771, 773 (Bankr. N.D. Ohio 1990). Here, however, Hiatt's loan consolidation did not effect an alteration of the terms of her original loans, but rather extinguished her original loans and replaced them with a new loan.

Although one bankruptcy court case cited by Hiatt does provide direct support for her position, *see McKinney I*, 120 B.R. at 420-21, we are not persuaded by that court's reasoning, nor was the district court that reviewed the decision. *See McKinney II*, 1992 U.S. Dist. LEXIS 14796, at *6-*7, *rev'g McKinney I*, 120 B.R. at 420-21. The *McKinney I* bankruptcy court failed to consider that, when a borrower undertakes a consolidation loan, the original loan is repaid in full and the debt is discharged, and also that section 523(a)(8)(A) provides for discharge of a debt only if the loan relating to *that* debt "first became due" more than five years prior to the bankruptcy filing.

We conclude that, in cases in which a debtor has consolidated her educational loans pursuant to 20 U.S.C. § 1078-3, the plain language of section 523(a)(8)(A) requires that the nondischargeability period commences on the date on which the consolidation loan first became due. Because Hiatt's consolidation loan first became due within five years of the filing of her bankruptcy petition, her debt to the Commission is not dischargeable under section 523(a)(8)(A).

CONCLUSION

The judgment is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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(CITE AS: 1993 WL 740986 (N.D.IND))

Rank (R) R. 3 of 50

Database ALLCASES

Jennifer Lee HIATT, Plaintiff
v.
INDIANA STATE STUDENT ASSISTANCE COMMISSION, Defendant

No. 4:93CV0072 AS.
United States District Court,
N.D. Indiana
Hammond Division
Nov. 24, 1993

MEMORANDUM AND ORDER

ALLEN SHARP, Chief Judge.

I. Jurisdiction

*1 The district court has jurisdiction to hear this appeal pursuant to 28 U.S.C. s 158(a), which confers jurisdiction on district courts to hear appeals from final judgments, orders, and decrees of the bankruptcy court. On August 10, 1993, the bankruptcy court entered a final judgment and order. Therefore, pursuant to 28 U.S.C. s 158(a), this court has jurisdiction to hear this appeal from the bankruptcy court's judgment. A pretrial

conference was held on November 12, 1993, in Lafayette, Indiana, at which time arguments of counsel were heard.

II. Facts

The plaintiff, Jennifer Lee Hiatt (Hiatt), received a number of STUDENTS LOANS between 1983 and 1985. These original STUDENT LOANS "first became due" on January 5, 1986. Decision and order on Motion for Summary Judgment (Summary Judgment Decision) at 2. On July 23, 1987, the plaintiff's LOANS were CONSOLIDATED. On May 24, 1991, Hiatt filed her underlying Chapter 7 bankruptcy petition. Plaintiff's Memorandum in support of Motion for Summary Judgment at 2. Hiatt sought discharge of her STUDENT LOANS, alleging that her debt is dischargeable pursuant to 11 U.S.C. s 523(A)(8)(A). On December 3, 1992, Bankruptcy Judge Grant denied the plaintiff's motion for summary judgment,

finding that Hiatt's LOANS were not dischargeable (Summary Judgment Decision at 4). On August 10, 1993, Bankruptcy Judge Grant found the defendant was entitled to $12,051.51 (Decision at 12). On October 5, 1993, the plaintiff filed her appeal with this court.

III. Issues Presented

The issue before this court is whether the bankruptcy court erred in finding that Hiatt's loans were not dischargeable. More precisely, the Plaintiff's argument can be divided into two subissues regarding dischargeability. The plaintiff claims the bankruptcy court erred in 1) its determination of the "first came due" date; and, 2) its finding that the consolidation was effective (Decision at 2).

IV. The Standard of Review

The standard of review this court must follow when reviewing factual

findings of the bankruptcy court is set forth in Bankruptcy Rule 8013, which provides:

> On appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed.R.Bk.P. 8013 (1993). While findings of fact are reviewed under the "clearly erroneous" standard, the bankruptcy court's conclusions of law must be reviewed de novo. Woodbridge Place Apartments v. Washington Square Capital, 965 F.2d 1429, 1435 (7th cir. 1992); Oneida Tribe of Indiana v. State of

Wisconsin, 951 F.2d 757, 760 (7th Cir. 1991); Calder v. Camp Grove State Bank, 892 F.2d 629, 631 (7th Cir. 1990).

*2 This standard notwithstanding the court notes that when so-called referees in bankruptcy were first authorized they were selected directly by United States District Court Judges, often in the nature of political patronage. It is quite true that in service most of these referees developed considerable expertise in the intricacies of bankruptcy law. More than a decade ago, the system of selecting bankruptcy judges changed radically. They are no longer selected by district judges or district courts' they are selected after a elaborate screening process by circuit judicial councils. Uniformly, a preexisting expertise in bankruptcy law is required. Each of the bankruptcy judges now serving in this district came to their task with very substantial preexisting

knowledge of bankruptcy law. In this context, the standard for review of bankruptcy judges has both a conceptual and a pragmatic aspect. It is the bankruptcy judges who see and hear the witnesses and must make basic decisions as to weight and credibility. The review process does not generally envision a trial de novo with regard to reviewable decisions by the bankruptcy court. Necessarily a bankruptcy litigant who attempts to overturn a reviewable bankruptcy decision sustains a substantial and heavy burden to demonstrate legal error.

V. Discussion

A. Issue I: the "First Came Due" Determination

Plaintiffs claiming their educational LOANS are dischargeable must overcome the rebuttal presumption that education LOANS are not dischargeable. Under 11 U.S.C. s

523, tow exceptions to this presumption exist: 1) the plaintiff's LOANS "first come due" outside of the statutory provision; 2) the plaintiff can demonstrate hardship under the statute. In her motion for summary judgment, the plaintiff alleged that her LOANS should not be discharged because her obligation first became due outside the statutory time period, pursuant to 11 U.S.C. s 523(A)(8)(A), which provides in pertinent part:

(a) A discharge under s 727, 1141, 1228(a), 1228(b), of this title does not discharge an individual debtor from any debt--

(8) for an educational LOAN made, insured, or guaranteed by a governmental unit, or a nonprofit institution, unless--

(A) such LOAN first became due before five (5) years (exclusive of any applicable suspension of the repayment

period) before the date of filing with the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. s 523(a)(8) (1978). [FN1] Hiatt claimed that her loans were dischargeable since they originally became due more than five years before Hiatt filed her petition. This date is not disputed, but the defendant has offered as an affirmative defense that, due to a subsequent consolidation of the plaintiff's loans, the first payment fell within the five-year time frame. The defendant argues that the time frame should be calculated from the date the first payment on the consolidated loan became due. Under this theory, the plaintiff's debt is not dischargeable.

*3 Bankruptcy Judge Grant's decision

reflects his meticulous analysis of the split authority advanced by the parties on the issue of "first became due:"

The debtor urges the court to compute the five year period in question from the date the original STUDENT LOANS first became due, without regard to the date the CONSOLIDATED LOAN first became due. The line of authority adopting this position is represented by the following decisions. In re McKinney, 120 B.R. 416 (Bankr.N.D. Ohio (1990), rev'd No. 1:90CV1946, 1992 U.S. Dist. LEXIS 14796, 1992 WL 265992 (D.N.D. Ohio May 12, 1992); In re Zieglar, 19 (Bankr. E.D.Va. 1982); In re Brown, 4 B.R. 745 (Bankr. E.D.Va. 1980).

The defendant urges the court to follow the authority which recognizes the appropriate date for computing the five year period as being the date the first payment under the consolidated loan was due. The decisions adopting this rule are

as follows: United States v. McGrath, 143 B.R. 820 (D.D.Md. 1992); In re McKinney, No. 1:90cv1946, 1992 U.S. Dist. LEXIS 14796, 1992 WL 265992 (D.N.D. Ohio May 12, 1992) rev'g 120 B.R. 416 (Bankr. N.D.Ohio 1990); In re Saburah, 136 B.R. 246 (Bankr. C.D. Cal. 1992); In re Martin, 137 B.R. 770 (Bankr. W.D.Mo. 1992).

Summary Judgment Decision at 2. This court agrees with the Bankruptcy Judge's statement that the line of authority advanced by the Plaintiff rely on "perceived policy considerations and assumptions concerning (an unstated) Congressional intent" (Summary Judgment Decision at 3, citations omitted). This court finds the Bankruptcy Judge did not err in refusing to follow that line of authority. This court agrees with Judge Grant's reasoning in finding the plaintiff's debt not dischargeable pursuant to 11 U.S.C. s 523(A)(8)(A):

Where the statute is clear upon its face, its interpretation should not be colored by perceptions of public policy or a presumed legislative intent. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41, 109 S.Ct. 1026, 1030 (1989); In re Stainton, 139 B.R. 232, 234-35 (Bankr. 9th Cir. 1992). The court concludes that s 523(a)(8)(A) is not ambiguous, either as written or as applied. The plain language of the statute requires the court to focus upon the date that the STUDENT LOAN obligation the debtor seeks to discharge first became due. This obligation is the CONSOLIDATED LOAN and not the original STUDENT LOANS which were satisfied through the CONSOLIDATION, McGrath, 143 B.R. at 824; McKinney, 1992 U.S.Dist. LEXIS 14796, at *6-7, 1992 WL 265992, at *2; Saburah, 136 B.R. at 252. Since the CONSOLIDATED LOAN first became due less than five years

prior to the date of debtor's petition for relief under Chapter 7 it is not discharged pursuant to s 523(a)(8)(A).

Summary Judgment Decision at 3. This court finds, therefore, that the Bankruptcy Judge did not err in finding that the debt the plaintiff seeks to discharge is the consolidated loan, not the original loans. The original loans were satisfied when the plaintiff's obligation for the consolidated loan arose; at the point the plaintiff filed her petition, only that obligation existed. Thus, the first payment became due within the five-year period and the loans are not discharged.

B. Issue II: The Effectiveness of the Consolidation *4 In his decision denying the plaintiff's motion for summary judgment on December 3, 1992, the Bankruptcy Judge found further proceedings were necessary to determine the second

prong of the statute regarding hardship. However, in these further proceedings, the plaintiff advanced a statute of frauds defense to the defendant's affirmative defense of consolidation:

In essence, plaintiff argues that the agreement creating the consolidated loan is not evidenced by an admissible writing and, thus, cannot be enforced. In the alternative, plaintiff argues, the writing, even if admissible, is unenforceable.

Decision at 2. While the parties have stipulated that a consolidated promissory note was executed on July 23, 1987, for $12,051.55, it cannot be produced (Decision at 2.) The defendant claims that it should be allowed to produce a copy of the note, although it contains alternations. The plaintiff claims that the copy of the note is neither admissible nor enforceable.

This court finds that the Bankruptcy Judge did not err in his analysis of the statute of frauds. This Judge also agrees with his findings on issues of authenticity, self-authenticating documents, and the relevant Federal Rules and the Uniform Commercial Code. Decision at 4-7. A further analysis of these issues is unnecessary because, as the Bankruptcy Judge noted, the defendant is not attempting to enforce the alterations. The parties had agreed that if the note were admissible and enforceable, the plaintiff would owe $12,051.55. The alterations reduced the loan to $7,924.12.

This court agrees that the defendant met its burden of proving the document authentic (Decision at 7), and that the plaintiff "failed to show that the evidenced exists that the original was not authentic" (Decision at 8). The plaintiff alleges that the document is not authentic

because she never signed the altered document. The Bankruptcy Judge correctly pointed out that this does not go to the authenticity of the original document, and the altered document is not at issue here:

> Defendant does not contend that plaintiff authorized the changes. Whether the alterations were made to the original or a duplicate of the original, the defendant is offering the document as proof of the terms of the plaintiff's original promissory note. Plaintiff has offered no evidence disputing the authenticity of that original document.

Another way to view this is to suppose that the defendant is seeking to have admitted the original of this note with the same alterations. The original would be admissible, alterations and all, because its authenticity would not be affected by the alterations. Instead, enforceability along, the true root of

plaintiff's argument, would be at issue.

Plaintiff has offered no reason why the situation here is not the same. Whether made to the original or a subsequent photocopy, the alterations raise questions concerning enforceability, not authenticity. The photocopy of the note is admissible and the statute of frauds requirement of a writing evidencing the agreement is met.

*5 Decision at 9.

Further, the Bankruptcy Judge rejected the plaintiff's arguments that even if the note were admissible, it is not enforceable. Noting that both parties failed to cite the Uniform Commercial Code, Bankruptcy Judge Grant cited the statutory language on alteration (Decision at 10, citation omitted). This court agrees with his analysis: "an altered instrument may be enforced according to its original tenor unless the alterations

were both material and fraudulent." Id. Further, this court finds that the Bankruptcy Judge did not err in finding that this note, while materially altered, was not fraudulent:

The distinction between material and nonmaterial alterations is clear. If the alteration changes the contract of a party to the instrument, it is material. Uniform Commercial Code, s 3-407 Official Comment 1. Any change in amount changes the contract and, thus, is material.

Such a change, however, is not per se fraudulent. The term "fraudulent" requires a deceitful or dishonest purpose to obtain more than what was bargained for. Business Bank v. Plank, 710 F.Supp. 619, 622 (E.D.Va. 1989). Where the change was for the benefit of the obligor, fraud is not inferred. Logan v. Central Bank of Alabama, 397 So.2d 151, 153 (Ala. Civ. App. 1981).

The official comment to s 3-407 states that:

> [t]here is not discharge ... where a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent; but if such an intent is found the alteration may operate as a discharge. Uniform Commercial Code, s 3-407 Official Comment 3(b).

Because neither party has expressed any explanation for any intent behind the alterations in this note, the court cannot infer a fraudulent intent on the part of the creditor, especially since the amount due on the note was reduced, not increased. The note therefore can be enforced according to its original tenor.

Decision at 11. Clearly, in this case, the defendant's copy of the note

reflected a benefit to the plaintiff by reducing her debt by approximately $5,000. This Judge finds that the Bankruptcy Judge did not err in finding the note enforceable.

VI. Conclusion

Based on this court's reasoning and the statutes and cases cited, the bankruptcy court's decision is AFFIRMED. IT IS SO ORDERED.

FN1. The plaintiff's Chapter 7 petition was filed before the effective date of the 1990 Amendments to the Bankruptcy Code, May 29, 1991, which extended the time period in question from five to seven years.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 91-40365

JENNIFER LEE HIATT
Debtor(s)

JENNIFER LEE HIATT
Plaintiff(s)

vs. PROC. No. 91-4027

INDIANA STATE STUDENT ASSISTANCE COMMISSION
Defendant(s)

DECISION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on December 3, 1992.

This matter is before the court on plaintiff's motion for summary judgment with regard to her complaint to determine dischargeability. The complaint is premised upon §523(a)(8) of the United States Bankruptcy Code and asks the court to determine that the amounts due the defendant on account of a student loan are dischargeable debts. The current motion

is founded upon §523(a)(8)(A) of the United States Bankruptcy Code. Pursuant to this portion of the Bankruptcy Code, a student loan will not be discharged unless:[1]

> [s]uch loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition. 11 U.S.C. §523(a)(8)(A).

The material facts with regard to the plaintiff's motion are not disputed. The plaintiff obtained a number of student loans which first became due on or about January 5, 1986, more than five years prior to the date of the debtor's petition. These loans were subsequently consolidated and the first payment, under

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[1] Debtor's petition under Chapter 7 was filed before the effective date of the 1990 amendments to the Bankruptcy Code, May 29, 1991, which, inter alia, amended §523(a)(8)(A) to extend the time period in question from five to seven years.

the consolidated obligation, became due less than five years prior to the date of the petition. Thus, the sole issue before the court is the legal question of whether a consolidated student loan, were the original loans which were consolidated first became due more than five years prior to the petition but the consolidated loan first became due less than five years prior to the petition, is dischargeable pursuant to §523(a)(8)(A). The court concludes that it is not.

The debtor urges the court to compute the five year period in question from the date the original student loans first became due, without regard to the date that consolidated loan first became due. The line of authority adopting this petition is position is represented by the following decisions. In re McKinney, 120 B.R. 416 (Bankr. N.D. Ohio 1990), rev.d No. 1:90CV1946, 1992 U.S. Dist. LEXIS

14796, 1992 WL 265992 (D.N.D. Ohio May 12, 1992); In re Ziglar, 19 B.R. 298 (Bankr. E.D. Va. 1982); In re Brown, 4 B.R. 745 (Bankr. E.D. Va. 1980).

The defendant urges the court to follow the authority which recognizes the appropriate date for computing the five year period as being the date the first payment under the consolidated loan was due. The decisions adopting this rule are as follows: United States v. McGrath, 143 B.R. 820 (D.D.Md. 1992); In re McKinney, No. 1:90CV1946, 1992 U.S. Dist. LEXIS 14796, 1992 WL 265992 (D. N.D. Ohio May 12, 1992), rev'g 120 B.R. 416 (Bankr. N.D. Ohio 1990); In re Saburah, 136 B.R. 246 (Bankr C.D. Cal. 1992); In re Martin, 137 B.R. 770 (Bankr. W.D. Mo. 1992).

The position espoused by the defendant and the case law supporting it represents a better reasoned analysis of §523(a)(8)(A) and is the appropriate rule

to apply. The decisions which commence the time period in question with the date the original student loans first became due do so primarily as a result of perceived policy considerations and assumptions concerning (an unstated) Congressional intent. McKinney, 120 B.R. at 420-21; Brown, 4 B.R. at 746. The issue before the court, however, is initially one of statutory construction. Where the statute is clear upon its face, its interpretation should not be colored by perceptions of public policy or a presumed legislative intent. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41, 109 S.Ct. 1026, 1030 (1989); In re Stainton, 139 B.R. 232, 234-35 (Bankr. 9th Cir. 1992). The court concludes that §523(a)(8)(A) is not ambiguous, either as written or as applied. The plain language of the statute requires the court to focus upon

the date that the student obligation the debtor seeks to discharge first became due. This obligation is the consolidated loan and not the original student loans which were satisfied through the consolidation. McGrath, 143 B.R. at 824; McKinney, 1992 U.S. Dist. LEXIS 14796, at *6-7, 1992 WL 265992, at *2; Saburah, 136 B.R. at 252. Since the consolidated loan first became due less than five years prior to the date of debtor's petition for relief under Chapter 7 it is not discharged pursuant to §523(a)(8)(A).

Although the debtor's obligation to the defendant is not dischargeable under §523(a)(8)(A) of the Bankruptcy Code, it may be dischargeable pursuant to §523(a)(8)(B), if debtor's continued liability would "impose an undue hardship on the debtor and the debtor's dependents." Further proceedings will be required before the court as sufficient

information available to it with which to make this determination.

IT IS THEREFORE ORDERED, that the debtor's obligation to the Defendant, Indiana State Student Assistance Commission, is not dischargeable, pursuant to 11 U.S.C. §523(a)(8)(A), and plaintiff/debtor's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that the plaintiff and defendant shall, within thirty (30) days of this date, submit a proposed pre-trial order with regard to the dischargeability, pursuant to 11 U.S.C. §523(a)(8)(B), of the debtor's obligation to the defendant. Upon the court's approval of the pre-trial order, the remaining issues raised by plaintiff's complaint will be scheduled for trial by separate order.

Judge, United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO 91-40365

JENNIFER LEE HIATT
Debtor(s)

JENNIFER LEE HIATT
Plaintiff(s)

vs. PROC. No. 91-4027

STATE STUDENT ASSISTANCE
COMMISSION OF INDIANA
Defendant(s)

JUDGMENT

At Fort Wayne, Indiana on August 10, 1993.

This matter having come before the court on plaintiff's complaint to determine dischargeability of an educational loan, the issues having been determined, and a decision rendered.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant, The State Student Assistance Commission of Indiana, have and recover from the Plaintiff, Jennifer Lee

Hiatt, the sum of $12,051.55 and that this amount is a nondischargeable debt expected from any discharge herein.

_____
Judge, United States
Bankruptcy Court

cc: Jennifer Hiatt
Price Jackson
Ray Merritt

JAN 13 1995
OFFICE OF THE CLERK

No. 94-1155

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JENNIFER LEE HIATT,
Petitioner,

v.

INDIANA STATE STUDENT ASSISTANCE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the five year nondischargeability period imposed by 11 U.S.C. section 523 (a)(8)(A) commences from the repayment date of the original student loans or from the repayment date of the subsequent, consolidated student loan obtained pursuant to 20 U.S.C. section 1078-3.

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In re Ziglar, 19 B.R. 298 (Bankr. E.D. Va. 1982) 10

STATUTES:

11 U.S.C. section 523(a)(8)(A) ... 3, 4, 5, 6, 7, 8, 11, 12, 14, 16, 17

20 U.S.C. section 1078-3 ..... 2, 16

OTHER AUTHORITIES:

H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1979) 13

No. 94-1155

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JENNIFER LEE HIATT,
Petitioner,

v.

INDIANA STATE STUDENT ASSISTANCE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Indiana State Student Assistance Commission, hereby opposes Jennifer Lee Hiatt's Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

Between 1983 and 1985, Hiatt executed separate and distinct guaranteed student loans which were made, insured,

or guaranteed under a program funded and administered by the Respondent, the Indiana State Student Assistance Commission. A-2. All of the original student loans entered into their repayment cycle and otherwise became due and owing on or about January 5, 1986. B-2. On July 23, 1987, Hiatt voluntarily elected to participate in the United States Department of Education's consolidated student loan program pursuant to 20 U.S.C. section 1078-3 and undertook a student loan consolidation of all of her original guaranteed student loans. A-2. The aggregate total of the loan consolidation was $12,101.48.

The proceeds from Hiatt's consolidated student loan extinguished the balance owing on her original student loans and the original notes were stamped with the "paid-in-full" designation.

Hiatt's original notes were subsequently canceled and all obligations associated with the original notes were extinguished. See A-2. Hiatt's consolidated student loan first became due and owing on or about September 20, 1987. A-2.

On May 24, 1991, Hiatt filed a bankruptcy petition pursuant to Chapter 7 of the United States Bankruptcy Code. A-2. Hiatt subsequently initiated an adversary complaint against the Respondent seeking a determination of the dischargeability of her student loan obligation pursuant to 11 U.S.C. section 523 (a)(8)(A). A-2 to A-3. Hiatt contended at trial that her student loan was dischargeable because her bankruptcy petition was filed more than five years after her original student loan notes had entered their repayment cycle. The

Commission argued that the original loan debt had been extinguished by the execution of the consolidated student loan and, therefore, the only debt remaining before the court was Hiatt's consolidated student loan. The consolidated student loan began its repayment cycle within five years of the filing of Hiatt's bankruptcy petition and was, therefore, not dischargeable under section 523 (a)(8)(A).

On December 3, 1992, The Bankruptcy Court denied Hiatt's motion for summary judgment and held Hiatt's consolidated student loan obligation to the Commission was not dischargeable. C-8 to C-9. The District Court affirmed, rejecting Hiatt's argument that the nondischargeability period should be computed from the repayment date of the original student loans. B-19. The

District Court agreed with the argument put forth by the Commission that the plain language of section 523(a)(8)(A) required the court to focus on the loan obligation currently before the court, which was the consolidated student loan and not the original notes. B-9 to B-12.

The Court of Appeals affirmed, also rejecting Hiatt's argument. A-7. The court concurred with the Commission's argument that the plain meaning of section 523(a)(8)(A) identified the consolidated loan as the sole remaining student loan obligation and this interpretation would further the intent of Congress to curb abuse and promote the viability of the student loan program. A-6.

REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no conflict among United States Courts of Appeals. No other Court of Appeals has ruled on the issue Hiatt presents. Moreover, the Seventh Circuit's opinion is consistent with the vast majority of bankruptcy court decisions and district court decisions since the issue was first addressed in 1992.

The Seventh Circuit's decision will ensure that the consolidated student loan, which is a guaranteed government student loan within the meaning of section 523(a)(8)(A), is in repayment for at least five years. Thus, the decision of the Seventh Circuit is proper because it furthers the intent of Congress to curb abuse of the bankruptcy system and to secure the viability of the federal

guaranteed student loan program for future student borrowers. In addition, the Seventh Circuit's interpretation of the plain meaning of section 523(a)(8)(A) promotes the uniform and equal treatment of all student loan debtors filing bankruptcy petitions. Student loan debtors will not be allowed to eradicate the troublesome portions of their old notes, participate and derive a benefit from additional guaranteed student loan programs and later claim the favorable repayment dates of the old extinguished notes in bankruptcy.

I. THIS CASE PRESENTS NO CONFLICT AMONG UNITED STATES COURTS OF APPEALS.

This case presents no conflict among the United States Courts of Appeals, so certiorari is not appropriate under Sup.Ct.R. 10.1(a). No other Court of

Appeals yet has addressed the question presented in this Petition. The Seventh Circuit's decision is consistent with the interpretation of 11 U.S.C. section 523 (a)(8)~~(A)~~ put forth by unanimously bankruptcy courts and district courts which have specifically addressed the question presented.

The question of whether the five year nondischargeability period should begin with the repayment date of original student loans or with the repayment date of consolidated student loans was not specifically addressed by bankruptcy courts and district courts until approximately 1992. The court in In re Saburah, 136 B.R. 246 (Bank. C.D. Cal. 1992), was one of the first trial courts to address the issue, and the court held that the date the consolidated student loan first became due began the

five year nondischargeability period and not the repayment date of the original student loans. The Seventh Circuit's decision is consistent with the decision in In re Saburah and with several other cases that have addressed the question. *See, e.g.,* In re Martin, 137 B.R. 770 (Bankr. W.D. Mo. 1992); In re McKinney II, 1992 U.S. Dist. Lexis 14796, *rev'g* In re McKinney I, 120 B.R. 416 (Bankr. N.D. Ohio 1990); United States v. McGrath, 143 B.R. 820 (D. Md. 1992).

Hiatt's statement that the Seventh Circuit's decision was contrary to the vast majority of bankruptcy court decisions is wrong. The cases cited by Hiatt do not in fact address the question presented in this case and, therefore, are not relevant to the issue at hand. *See, e.g.,* In re Brown, 4 B.R. 745

(Bankr. E. D. Va. 1980)(court determined that the five year nondischargeability period begins to run on the date on which a student borrower's original notes first became due, not the date of default on a subsequent installment note, at which point the entire balance became due); In re Ziglar, 19 B.R. 298 (Bankr. E.D. Va. 1982)(dispositive issue was whether a particular loan was an "educational loan" within the meaning of section 523(a)(8)(A)); In re Washington, 41 B.R. 211 (Bankr. E.D. Va. 1984)(exception to discharge for student loans did not apply to co-makers who were not student borrowers); In re Hogan, 43 B.R. 117 (Bankr. D. Az. 1984)(dispositive issue was whether scholarship funds were covered by section 523 (a)(8)(A)); Elmira College v. Savercool, 51 B.R. 180 (W.D. N.Y. 1985)(court addressed the undue

hardship exception of section 523 (a)(8)); In re Barciz, 123 B.R. 771 (Bankr. N.D. Ohio 1990)(court considered whether an alteration of the terms of an educational loan constituted a "suspension of the repayment period").

The only bankruptcy court case cited by Hiatt, In re McKinney, 120 B,R, 416 (Bankr. N.D. Ohio 1990), that provides direct support for her position is not good law. The district court in McKinney II promptly reversed the bankruptcy court's decision on which Hiatt relies and stated the bankruptcy court had failed to consider that the original loans had been repaid in full by the consolidated student loan. The district court further stated that section 523(a)(8)(A)'s reference to "such loan" meant the debt sought for discharge which was the consolidated

student loan, not the original notes.

Because no other United States Court of Appeals has ruled in conflict with the Seventh Circuit on this issue and because the Seventh Circuit's decision is consistent with the interpretation of section 523(a)(8)(A) as set forth by the vast majority of bankruptcy and district courts, this Court should deny Hiatt's Petition for Certiorari.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The Seventh Circuit correctly decided that the five year nondischargeability period commenced on the date that the consolidated student loan first became due, not on the repayment date of the original notes. A-7. The interpretation of section 523(a)(8)(A) rendered by the Seventh

Circuit is consistent with the stated Congressional intent to curtail abuse and to promote the viability of the federal student loan program. Congress included student loans within the exception to the general rule of dischargeability because many student borrowers were filing for bankruptcy and obtaining a discharge of their student loans soon after graduation before making any meaningful attempts to repay their loan obligation. H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1979). The inclusion of the five year nondischargeability period was a concentrated effort by Congress to maintain the loan program by curbing the abuse.

Hiatt has stated in her Petition that Congress intended to "simply delay" students from discharge. It has been well documented that the rationale of

Congress for the nondischargeability period was to assist in protecting the student loan program from abuse and secure its future viability. See Elmira College v. Savercool, 51 B.R. at 182; In re Martin, 137 B.R. at 773. The Court of Appeals' interpretation furthers the intent of Congress by ensuring that the consolidated student loan is in repayment for a minimum of five years, thus promoting the viability of the federal student loan program for future student borrowers.

Also, the Seventh Circuit's interpretation of the plain meaning of section 523(a)(8)(A) is proper. It does not create a two class system of debtors nor does it artificially extend the nondischargeability period, as Hiatt contends in her Petition. The Court of Appeals' decision effectively promotes

a uniform and equal treatment of student loan borrowers filing for bankruptcy. To this point, the bankruptcy court in In re Martin, 137 B.R. at 775, stated:

> It would be inequitable for the borrower to extinguish the old notes, eradicate the troublesome parts of the old loans, accept the significant benefits provided by the legislation, and then claim the favorable repayment dates of the old notes are still binding in bankruptcy. The trade-off for the benefits is both a waiver of defenses on the note and adjustment of the nondischargeability period from the date of the new obligation.

The decision of the Court of Appeals also has not artificially extended the nondischargeability period. The consolidated student loan is in fact a second government guaranteed student loan debt. And, as the bankruptcy court reasoned in In re Saburah, 136 B.R. at

252, if Congress has intended to use the repayment date of the original notes instead of the repayment date of the consolidated student loan notes, "then Congress could have and should have (either when originally drafting the 11 U.S.C. section 523 (a)(8)(A) or when amending the period from five to seven years) stated that such loan was dischargeable if such loan or any earlier loan on the same subject became due...". Congress has yet to propose or implement any such language either in the bankruptcy code or 20 U.S.C. section 1078-3, which established the consolidated student loan program.

The Court of Appeals' opinion is consistent with the stated intent of Congress to curb abuse and promote the viability of the student loan program. The Court of Appeals' decision also

furthers the equal treatment of student loan debtors and is consistent with the plain meaning of section 523 (a)(8)(A).

CONCLUSION

For reasons stated in this Opposition, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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JANUARY 13, 1994

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